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Ex parte Wong Sau Kee

B HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO 29–685–02 OF 2013
ABU BAKAR JAIS JC
7 SEPTEMBER 2015

C *Evidence — Fresh or further evidence — Admission of, on appeal — Application for leave to adduce fresh evidence — Whether JC exercised reasonable diligence in trying to get documents he wanted to introduce as fresh evidence — Whether there were cogent reasons for application to be allowed*

D On 28 May 2015 the Director General of Insolvency ('DGI') had applied to court for a proposed scheme of arrangement. The judgment creditor ('the JC') had objected to the application. The senior assistant registrar granted the order approving the scheme. By way of this application made pursuant to O 56 r 1(3A) of the Rules of Court 2012 ('the RC'), the JC appealed against that E decision of the SAR. The JC's application was grounded on the fact that he had fresh evidence against three judgment debtors ('the JDs'). The JDs and the DGI resisted the JC's application seeking to adduce fresh evidence. The fresh evidence that the JC wanted to adduce was the Central Credit Reference F Information System ('CCRIS') report and the JDs' statement of affairs. The JC claimed that these documents were not available during the hearing before the learned SAR. The JC also alleged that these documents, which were also not disclosed by the DGI in its investigation, were within the ambit of the DGI to conduct investigation. The JDs in turn submitted that the JC could have easily G obtained the JDs' statement of affairs but had failed to do so and there was no explanation why this was not done. The JDs say and that the JC had not shown the diligence to obtain these documents.

Held, dismissing the application with costs:

H (1) Under O 56 r 1(3A) of the RC, which is a statutory codification of the principles laid down by the English Court of Appeal in *Ladd v Marshall*, fresh evidence was not admissible unless the conditions set out therein were met. Applying the principles of *Ladd v Marshall*, it was clear that the JC had to show that he had exercised reasonable diligence in trying to get I the documents he wanted to introduce as fresh evidence. However, in the present case the JC had not shown diligence in trying to obtain the documents for the hearing before the SAR. The JC could easily have obtained the documents by conducting a search or by writing to the DGI. The lack of effort on his part showed that there was no exercise of

diligence by him. There was also no attempt whatsoever made by the JC to inspect the JDs statement of affairs despite it being available since 23 April 2013. Thus, based on the evidence the JC had not shown reasonable diligence in obtaining the documents he sought to adduce as fresh evidence. Further, parties should not be allowed to introduce fresh evidence without cogent reasons as this had the tendency to not only upset the hearing of the case as a whole but also to the court. When cases had been decided by the courts, it was simply unfair for the winning party to be asked to litigate the matter further just because the opposing party claims there was fresh evidence (see paras 6–13 & 17).

(2) The JC's attempt to shift the focus to the DGI by alleging that the latter had not carried out a proper investigation of the JDs was not at all consistent with the requirements upon which the JC had to fulfil for his application now. The lack of investigation even if any on the part of the DGI was not the issue. The issue was whether the JC had exercised diligence in trying to get the documents he wanted to introduce as fresh evidence (see para 14).

(3) Likewise the fact that the JDs had misled the DGI by providing the latter with inaccurate or misleading information was not an issue in the present application by the JC (see para 15).

[Bahasa Malaysia summary

Pada 28 Mei 2015 Ketua Pengarah Insolvensi ('KPI') telah memohon kepada mahkamah untuk skim penyusunan yang dicadangkan. Pemiutang penghakiman ('JC') telah membantah kepada permohonan tersebut. Timbalan kanan pendaftar ('TKP') membenarkan perintah meluluskan skim tersebut. Melalui permohonan ini dibuat berikutan A 56 k 1(3A) Kaedah-Kaedah Mahkamah 2012 ('KKM'), JC merayu terhadap keputusan TKP. Permohonan JC adalah berasaskan atas fakta bahawa dia mempunyai keterangan baru terhadap tiga penghutang penghakiman ('JD'). JD dan KPI menolak permohonan JC memohon untuk mengemukakan keterangan baru. Keterangan baru yang JC hendak kemukakan adalah laporan Central Credit Reference Information System ('CCRIS') dan penyataan hal ehwal JD. JC mendakwa bahawa dokumen-dokumen ini tidak terdapat semasa pendengaran di hadapan TKP yang bijaksana. JC juga mendakwa bahawa dokumen-dokumen ini, yang mana juga tidak dikemukakan oleh KPI dalam siasatannya, adalah dalam lingkungan KPI untuk menjalankan siasatan. JD sebaliknya berhujah bahawa JC mudah untuk mendapatkan penyataan hal ehwal JD tetapi gagal berbuat sedemikian dan tidak terdapat penjelasan mengapa ia tidak dibuat. JD menyatakan bahawa JC tidak menunjukkan ketekunan untuk mendapatkan dokumen-dokumen ini.

Diputuskan, menolak permohonan dengan kos:

(1) Di bawah A 56 k 1(3A) KKM, yang mana adalah pengekodan statutori prinsip-prinsip yang ditetapkan oleh Mahkamah Rayuan England dalam kes *Ladd v Marshall*, keterangan baru tidak boleh diterima kecuali syarat-syarat yang ditetapkan di dalamnya dipenuhi. Mengguna pakai prinsip-prinsip dalam kes *Ladd v Marshall*, ia adalah jelas bahawa JC perlu menunjukkan bahawa dia telah melaksanakan ketekunan munasabah dalam mencuba untuk mendapatkan dokumen-dokumen yang dia ingin perkenalkan sebagai keterangan baru. Walau bagaimanapun, dalam kes ini JC tidak menunjukkan ketekunan dalam mendapatkan dokumen-dokumen bagi pendengaran di hadapan TKP. JC dengan senang mendapatkan dokumen-dokumen dengan menjalankan pencarian atau dengan menulis kepada KPI. Ketiadaan usaha ini oleh pihaknya menunjukkan bahawa tidak terdapat pelaksanaan ketekunan olehnya. Juga tidak terdapat apa-apa percubaan yang dibuat oleh JC untuk menyiasat penyataan hal ehwal JD meskipun ia terdapat semenjak 23 April 2013. Oleh itu, berdasarkan keterangan JC tidak menunjukkan ketekunan munasabah dalam mendapatkan dokumen-dokumen yang dipohonnya untuk mengemukakan keterangan baru. Selanjutnya, pihak-pihak tidak patut dibenarkan untuk memperkenalkan keterangan baru tanpa alasan yang meyakinkan kerana ini mempunyai kecenderungan bukan sahaja mengganggu pendengaran kes tersebut secara keseluruhan tetapi juga kepada mahkamah. Apabila kes-kes diputuskan oleh mahkamah-mahkamah, ia memang tidak adil bagi pihak yang berjaya diminta untuk melitigasi perkara selanjutnya hanya kerana pihak yang menentang mendakwa terdapat keterangan baru (lihat perenggan 6–13 & 17).

(2) Percubaan JC untuk mengarahkan fokus kepada KPI dengan mendakwa bahawa KPI tidak menjalankan siasatan betul terhadap JD langsung tidak konsisten dengan kehendak di mana perlu dipenuhi oleh JC bagi permohonannya sekarang. Ketiadaan siasatan walaupun tidak ke atas mana-mana bahagian KPI bukanlah isu. Isu adalah sama ada JC telah menjalankan ketekunan dalam mencuba untuk mendapatkan dokumen-dokumen yang dia hendak perkenalkan sebagai keterangan baru (lihat perenggan 14).

(3) Begitu juga fakta bahawa JD telah memperdayakan KPI dengan memperuntukkan kepada KPI maklumat yang tidak betul atau menipu bukan isu dalam permohonan ini oleh JC (lihat perenggan 15).]

Notes

For cases on admission of, on appeal, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 2041–2063.

Cases referred to

Ladd v Marshall [1954] 3 All ER 745, CA (refd)
Lim Hong Kee David, Re [1995] 4 MLJ 564, HC (refd)
Milik Perusahaan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd [2003] 1 MLJ 6, CA (refd)

Legislation referred to

Bankruptcy Act 1967 s 16 (4)
Rules of Court 2012 O 56 r 1(3A)

Afdhilani Jusoh (Faizul Nasir & Assoc) for the judgment debtor.
Tan Keng Teck (Lim Kian Leong & Co) for the judgment creditor.
Faezahnoor Azeannie Jamian for the Director General of Insolvency.

Abu Bakar Jais JC:

INTRODUCTION

[1] In this case the judgment creditor ('JC') applies to adduce fresh evidence against all three judgment debtors ('JDs') for its appeal against the decision of the learned senior assistant registrar ('SAR'). The application is made pursuant to O 56 r 1(3A) of the Rules of Court 2012 ('the RC'). The application is resisted by the all three JDs and the Director General of Insolvency ('DGI').

MATERIAL FACTS

[2] The JC had objected to the scheme of arrangement (composition) applied by the DGI for the approval of the court dated 28 May 2014. On 16 October 2014 the learned SAR allowed the application of the DGI and dismissed the objection of the JC. The JC appealed against the said decision and now wants fresh evidence to be adduced for the hearing of the appeal.

[3] The fresh evidence that the JC wants to adduce is the Central Credit Reference Information System ('CCRIS') report dated 31 October 2014 and JDs statement of affairs dated 23 April 2013.

[4] These documents according to the JC were not available during the hearing before the learned SAR. These documents also were within the ambit of the DGI to conduct investigation. These documents were also not disclosed by the DGI in their investigation.

[5] The JDs in turn say the JC could easily have done a search on the JDs statement of affairs but had failed to do so and there was no explanation why

this was not done. The JDs say that the JC had not shown the diligence to obtain these documents.

FINDINGS OF COURT

[6] As stated this application of the JD is made pursuant to O 56 r 1(3A) of the RC that states:

> At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that –
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> (a) at the hearing before the Registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
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> (b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the Registrar.

[7] In explaining the provision above, Gopal Sri Ram JCA (as he then was) in *Milik Perusahaan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd* [2003] 1 MLJ 6 affirmed that O 56 r 1(3A) is a statutory codification of the principles laid down by the English Court of Appeal in *Ladd v Marshall* [1954] 3 All ER 745, and that fresh evidence is not admissible unless the conditions set out therein are met.

[8] Therefore the principles of that classic English case of *Ladd v Marshall* [1954] 3 All ER 745 are important to be taken into account and the same are as follows:

(a) first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(b) second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and

(c) third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[9] Having in mind the principles above, I am of the finding that the JC had not shown diligence in trying to obtain the documents before the hearing by the learned SAR. The JC could easily have obtained the documents by conducting a search or the very least to write to the DGI had it been diligent enough. The lack of effort towards this means there was no exercise of diligence on the part of the JC.

[10] There was also no attempt whatsoever made by the JC to inspect the JDs statement of affairs despite it being available since 23 April 2013. A

[11] More so when I consider s 16 (4) of the Bankruptcy Act 1967 that states: B

> Any person stating himself, in writing, to be a creditor of the bankrupt may personally or by agent inspect this statement at all reasonable times and take any copy thereof or extract there from, but any person untruthfully so stating himself to be a creditor shall be guilty of a contempt of court and shall be punishable accordingly on the application of the Director General of Insolvency. C

[12] Further, the JDs can fully rely on the case in *Re Lim Hong Kee David* [1995] 4 MLJ 564, where the court explained what is meant by the phrase 'reasonable diligence' and in this regard the relevant part of the judgment reads: D

> Diligence means industry. It is a steady, earnest and meticulous pursuit towards the attainment of one's goal. In the context of obtaining the fresh evidence that is intended to be adduced, the party seeking to make such an introduction ought to satisfy the court that he has made all reasonable cogent and positive efforts in the pursuit of obtaining the best evidence to prove his case. It is his duty to show to the court that neither indolence nor a lackadaisical attitude predominated in the preparation of his case nor that insufficient preparation at the pre-trial stage led to the party being unable to adduce the evidence he now seeks to introduce as fresh evidence. If all reasonable efforts had been exhausted and fresh evidence that is sought to be introduced could not have been thus obtained the court ought then to allow for the admission of such fresh evidence subject of course to any existing statutory provisions. *Positive, tangible or clear explanation ought to be given as to why such evidence could not have been obtained with reasonable diligence for use at trial.* (Emphasis added.) E F

[13] I am satisfied following the above case, the JC had not shown reasonable diligence in obtaining the documents for the reasons that I had explained. G

[14] It is also my finding that the JC had not grasp the issue properly by suggesting that the DGI had the duty to investigate thoroughly the JDs position as the DGI is the assignee upon the bankruptcy of the JDs. There is no dispute that the DGI has that duty, but the issue here is not on that duty of the DGI but whether the JC had exercise diligence in trying to obtain the documents. Shifting the focus to the DGI, is not at all consistent with the requirements upon which the JC itself must fulfil for its application now. The lack of investigation even if any on the part of the DGI is not the issue. The issue is whether the JC had exercise diligence in trying to get the documents it wants to introduce as fresh evidence. H I

[15] Likewise the JC had not correctly addressed its mind when it alleged the

JDs had wrongly or inaccurately or misleadingly given the information for the DGI to agree to the scheme of arrangement. Whether the JDs had misled the DGI is not an issue for the JC's application. There may well be misleading information given but the issue is whether the JC had done all it could to obtain the documents for the hearing before the learned SAR. As explained, the JC had not done that because they could easily have made a search on the statement of affairs of the JDs or the very least write to DGI to enquire the same on these documents including the CCRIS report.

[16] At this juncture, it is most opportune to stress that the application to introduce fresh evidence should not be willy-nilly granted. This is because the introduction of fresh evidence without justification hinders the expeditious disposal of the cases to be heard and when evidence had been introduced in the original hearing, parties cannot without cogent reasons be allowed to later introduce fresh evidence as this has the tendency to upset the hearing of the case as a whole not only to the opposing party not introducing the intended fresh evidence, but also to the court. Parties must come to court ready to battle their cases with evidence at the first date of hearing. When cases have been decided by the courts, it is simply unfair for the winning party to be asked to litigate the matter further just because the opposing party says there is fresh evidence.

[17] For the all the reasons explained, the application of the JC to adduce fresh evidence is dismissed with cost.

Application dismissed with costs.

Reported by Kohila Nesan